## Congress of the United States

CONGRESSIONAL OVERSIGHT PANEL

May 19, 2009

The Honorable Timothy F. Geithner Secretary of the Treasury United States Department of the Treasury Room 3330 1500 Pennsylvania Avenue, N.W. Washington, D.C. 20220

The Honorable Ben S. Bernanke Chairman Board of Governors of the Federal Reserve System 20<sup>th</sup> Street and Constitution Avenue, N.W. Washington, D.C. 20551

Dear Secretary Geithner and Chairman Bernanke:

The New York State Attorney General, Andrew Cuomo, has sent a letter, dated April 23, 2009, to Senator Christopher Dodd, the Chairman of the Senate Committee on Banking, Housing, and Urban Affairs; Congressman Barney Frank, the Chairman of the House Financial Services Committee; Mary Schapiro, the Chairman of the U.S. Securities and Exchange Commission; and me, in my capacity as Chair of the Congressional Oversight Panel. The letter asserts that the Department of the Treasury and the Federal Reserve Board intervened to alter the course of the then-pending acquisition of Merrill Lynch by Bank of America ("BofA").

The assertions have not been established or even subjected to formal challenge. But they still raise a critical policy issue, namely, the proper role of the Treasury and the Board in dealing with individual financial institutions during the administration of the Troubled Asset Relief Program (the "TARP").

There appears to be no dispute that intense discussions took place among Treasury, the Board, and Kenneth Lewis, the Chairman and CEO of BofA, in December 2008, after BofA's shareholders had approved the acquisition of Merrill Lynch. The discussions came when Treasury and the Board learned that BofA had concluded that it could, and should, stop the transaction because of Merrill Lynch's deteriorating financial condition. Mr. Lewis has indicated in a statement made under oath to the Attorney General's investigators that he changed his mind about ending the merger after it was strongly suggested that the government would remove BofA's Board of Directors and

senior management if the transaction were terminated, but that if it completed the transaction, BofA would receive additional federal assistance to provide a financial cushion for its taking on Merrill Lynch's liabilities. Treasury had made a \$25 billion capital infusion into BofA in October 2008, and it made an additional \$20 billion infusion into BofA in January 2009, after the Merrill Lynch acquisition was completed.

The fact and nature of the discussions among the Treasury, the Board, and BofA – whatever their exact content - were disclosed neither to the shareholders of BofA nor to the public, whose tax dollars the TARP spends. But for Attorney General Cuomo, the nondisclosure would continue to this day.

The reaction to these disclosures underscores the importance of clear, timely, communication with the American people, to say nothing of affected investors, about the financial stability package. Unexpected disclosures only increase the perception that the government cannot operate openly in administering the TARP, despite the fact that the country's largest banks are being supported with billions of dollars of public funds.

More important, this interaction among Treasury, the Board, and BofA is a warning of the dangers that can arise when the government acts simultaneously as regulator, lender of last resort, and shareholder. (Treasury had purchased \$15 billion in convertible preferred stock and warrants of BofA on October 28, 2008; as indicated above, it purchased an additional \$20 billion of BofA preferred stock and warrants on January 16, 2009.) The TARP by its very nature creates conflicts of interest for Treasury and the Board. The conflicts can arise not only when the nation's senior financial officials are faced with decisions by a private institution that they believe would adversely affect the stability plan, but also when they are asked to make regulatory decisions that affect the institutions in which the government holds shares. Federal officials can act effectively under these circumstances only if strict controls, transparency, and a disciplined response to situations at all levels, earn the trust of the financial sector, the investment community, and the public.

The Panel is interested in your thoughts on how to manage this inherent conflict and on the controls you have put in place to ensure that your efforts to provide stability to the country's financial system are not undermined by these conflicts.

Very truly yours,

Elizabeth Warren

Chair

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